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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 369

AMERICAN FARM LINES, *Appellant,*

v.

BLACK BALL FREIGHT SERVICE, et al., *Appellees.*

No. 382

INTERSTATE COMMERCE COMMISSION, *Appellant,*

v.

BLACK BALL FREIGHT SERVICE, et al., *Appellees.*

On Appeal From the United States District Court For the Western District of Washington

BRIEF OF APPELLANT AMERICAN FARM LINES

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BRIEF OF APPELLANT AMERICAN FARM LINES

OPINION BELOW

These are consolidated appeals from a judgment of the United States District Court for the Western District of Washington, entered March 26, 1969. The Opinion, Findings of Fact and Conclusions of law of the district court are reported as 298 F. Supp. 1006.

The district court's judgment nullified orders of the Interstate Commerce Commission entered September 3, 1968 and December 19, 1968. These orders each granted appellant American Farm Lines ("AFL")

temporary autho a motor common carrier to haul general commod r the United States Government between nine md southwestern states and five western states. Ters of the ICC (which appear at (A. 143a and A. are not reported.

RISDICTION

The judgmen he district court was entered March 26, 1969. filed a Notice of Appeal in the court below on 3, 1969 (R. 4017), and filed its Jurisdictional ent in this Court on July 22, 1969. Probable j tion was noted October 27, 1969. The jurisdictionis Court rests upon 28 U.S.C. § 1253 and 2101(

STATUTE EGULATIONS INVOLVED

Section 210a(he Interstate Commerce Act, 52 Stat. 1238, as ad, 49 U.S.C. § 310a(a), provides in relevant part ows:

> (a) To enal provision of service for which there is an iate and urgent need to a point or points om a territory having no carrier service capf meeting such need, the Commission may discretion and without hearings or other prags, grant temporary authority for such ser a common carrier . . . by motor vehicle . . .

Relevant portf the regulations of the Interstate Commercemission dealing with the filing and processing plications for temporary motor carrier authorit C.F.R. § 1131.2 and 1131.3) and with petitions fosideration of orders of appellate divisions of the ission on review of decisions of Commission boa9 C.F.R. § 1100.101(g)) are set forth in Appendereto.

QUESTIONS PRESENTED

The questions presented by this appeal are:

1. Whether the district court erred in nullifying temporary authority orders of the Interstate Commerce Commission on the ground that the Defense Department statement supporting the application did not literally comply with procedural rules of the ICC, when the statement substantially provided the information called for by those rules?

2. Whether the record as a whole before the Interstate Commerce Commission contained evidence to support the Commission's grant of temporary authority to American Farm Lines?

3. Whether the court below erred in holding that the Interstate Commerce Commission lacked jurisdiction to reopen the record in a pending temporary authority application proceeding at a time when petitions for reconsideration were properly before the Commission and the court's jurisdiction had been invoked for the limited purpose of securing interlocutory relief?

STATEMENT OF THE CASE

American Farm Lines is both a federation of agricultural marketing cooperatives and an agricultural cooperative. AFL was formed in 1964 to provide motor transportation services to its members. Its sixteen member cooperatives engage in the processing and marketing of the products grown by their own members.[1]

As a cooperative and federation of cooperatives AFL was not at the time of its formation, and is not now,

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[1] The principal facilities of AFL's members are located in Washington, Oregon, Northern California, Utah, Nebraska, Missouri, Texas, New Mexico, Wisconsin, Maryland, Illinois and Massachusetts.

required by law to possess a certificate of public convenience and necessity from the Interstate Commerce Commission in order to transport freight for its members. Prior to its amendment in 1968, section 203(b)(5) of the Interstate Commerce Act, ch. 722, 54 Stat. 921 exempted from such certification:

> motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended, or by a federation of such cooperative associations, if such federation possesses no greater powers or purposes than cooperative associations so defined. . . .[2]

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[2] Section 15(a) of the Agricultural Marketing Act of 1929, 12 U.S.C. § 1141j, defined the term "cooperative association" as follows:

> As used in this subchapter, the term "cooperative association" means any association in which farmers act together in processing, preparing for market, handling, and/or marketing the farm products of persons so engaged, and also means any association in which farmers act together in purchasing, testing, grading, processing, distributing, and/or furnishing farm supplies and/or farm business services. *Provided, however,* That such associations are operated for the mutual benefit of the members thereof as such producers or purchasers and conform to one or both of the following requirements:
>
> First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein; and
>
> Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.
>
> And in any case to the following:
>
> Third. That the association shall not deal in farm products, farm supplies, and farm business services with or for nonmembers in an amount greater in value than the total amount of such business transacted by it with or for members. All business transacted by any cooperative association for or on behalf of the United States or any agency or instrumentality thereof shall be disregarded in determining the volume of member and nonmember business transacted by such association.

In 1965 this exemption was construed to authorize an agricultural cooperative, engaged in motor transportation, to carry freight for shippers who are not members of the cooperative, to the extent that such nonmember transportation is "incidental and necessary" to the cooperative's primary transportation activities. *Northwest Agricultural Cooperative Ass'n* v. *Interstate Commerce Commission*, 350 F.2d 252 (9th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966). In December 1966, under the authority of that exemption, AFL began to haul freight for the Department of Defense to meet urgent defense needs.[3]

During 1967, AFL's ability to carry nonmember freight was threatened in two respects:

(1) Legislation designed to limit substantially the scope of the exemption provided to cooperatives under section 203(b)(5), was introduced in Congress with the support of the American Trucking Associations, Inc.,

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[3] It was at this time that the Secretary of Defense adopted a policy of using farm cooperative transportation "because of our responsibility to obtain effective transportation of military supplies at the lowest overall cost to the Government and the taxpayer", and to encourage competition in the provision of transportation services to the Department. *Hearings on Agricultural Cooperative Transportation Exemption Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce*, 90th Cong., 1st Sess. 155 (1967) (testimony of Defense Department witness). This action was required by Department of Defense Directive No. 4500.9, par. IV(C)(1) (September 27, 1968) which instructs all components of the Department to select that means of transportation "which will meet DOD requirements satisfactorily at the lowest overall cost from the origin to the final known destination." The directive also indicates that consideration must be given to the economies available through reductions in indirect costs which may be obtained from expedited service of the sort performed by AFL.

and AFL's principal competitors for Government business.[4]

(2) A group of common carriers of munitions, who competed with AFL for Government business and whose rates were generally higher than those charged by AFL,[5] filed suit against AFL in the United States District Court for the Western District of Oklahoma under section 222(b)(2) of the Interstate Commerce Act, 49 U.S.C. § 322(b)(2) (Supp. IV 1965-1968). They were attempting to impose severe limitations on AFL's ability to carry freight—particularly explosives—for the United States Government. *Munitions Carriers Conference, Inc.* v. *American Farm Lines,* Civ. No. 67-487, (W.D. Okla.). On February 20, 1968, an injunction was entered in this case prohibiting AFL from performing "back-to-back" movements—that is, two consecutive movements—for the United States Government.[6]

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[4] S. 752, 90th Cong., 1st Sess. (1967). As originally introduced, S. 752 would have made the exemption available "only when the nonmember transportation involved farm products, farm supplies, or other farm-related traffic." In the form in which it was enacted, the legislation imposed a quantitative limitation on the volume of nonmember freight a cooperative could carry within the scope of the exemption. See p. 13, *infra.*

[5] An affidavit filed in the court below showed that between December 1966 and March 1969 AFL's lower rates saved the Government over $1,000,000 in direct transportation costs. (A.402a)

[6] On May 28, 1968 the same district court, in a companion case, *Munitions Carriers Conference, Inc.* v. *American Farm Lines,* Civ. No. 68-148, (W.D. Okla.), enjoined AFL from carrying nonmember freight except when proceeding to pick up or when returning from delivery of a member shipment, and then only when necessary to prevent proceeding with an empty vehicle.

Because of the injunctive restrictions imposed upon it, and in anticipation of the restrictive legislation enacted later in 1968, AFL filed applications with the ICC for temporary and permanent authority to carry freight for the United States Government as a regulated common carrier between nine mid- and southwestern states and five western states.[7] The Department of Defense vigorously supported both of these applications because of its urgent need for precisely the kind of service AFL had demonstrated it could provide.[8]

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[7] The applications sought authority to operate between all points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma and Kansas, on the one hand, and all points in Washington, California, Nevada, Utah and Arizona, on the other.

[8] The American Trucking Associations attempted to bring pressure on the Department to withdraw its support of AFL's application by going directly to the Secretary of Defense. In a reply from the Secretary's Assistant for Installations & Logistics to the President of the ATA (A. 139a), the Department reiterated its support for AFL, stating:

> This has reference to your recent letter to the Secretary of Defense asking that Department of Defense support of the application of American Farm Lines, Inc., for temporary Interstate Commerce Commission operating authority be withdrawn.
>
> Your request is, among other things, based on the view that action in supporting the above mentioned application is a complete reversal of existing Department of Defense policy. I wish to asssure you that such is not the case.
>
> It has been the policy of this Department, in fact we are required, to obtain the commercial transportation services we need at the lowest sound cost with due consideration being given to service factors. Also a basic objective of long standing is the reduction of costs associated with the distribution of military supplies and equipment to the maximum feasible

Pursuant to ICC regulations, 49 C.F.R. § 1131.2(c), the Defense Department, as the primary shipper to be served by AFL, urged the ICC to grant the application. (A. 14a) The Department's letter stated that "in order to improve logistics effectiveness and to reduce costs the Department is constantly looking for ways to

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extent. Thus, we obviously have had a continuing interest in the shortening of the logistics pipeline with its attendant reduction in inventory levels.

Our indicated support of American Farm Lines' application for temporary authority is wholly consistent with our policy and with the objective stated above. Consequently, to withdraw this support would not be in keeping with the obligations this Department has to operate efficiently and economically and to improve its logistics operations wherever possible.

American Farm Lines has provided a service for the movement of our traffic which has been excellent in every respect and has also resulted in significantly reduced rates. We desire that the type and quality of service which American Farm Lines has provided to the Department be continued. In fact, we would like to see it expanded wherever it may be feasible to do so.

The policies referred to in the letter are further amplified in Department of Defense Instruction Number 4500.17 (January 16, 1969) which provides, in part, as follows:

B. *Operating Authority or Carrier Serivce.* Participation by DoD in transportation regulatory body proceedings involving the inauguration, expansion, or reduction of operating authority or carrier service will be undertaken only when:

1. The Department of Defense is named as a party to the proceedings by a transportation regulatory body, or

2. A transportation regulatory body requests information from DoD on matters pending before it, or

3. The Single Manager concerned (Directives 5160.2, 5160.10 and 5160.53 references (c), (d), and (e)) determines that

'shorten the pipeline' of its vital military supplies" through the reduction of transit times between points of manufacture and points of export. In more than 1200 shipments carried for the Department by AFL under its exemption, the letter stated, AFL had not only provided excellent service in "shortening the pipeline," but had afforded the Department "a meaningful measure, under practical conditions, of carrier capability in general." However, because of the injunctive restrictions that had been imposed upon AFL's operations AFL had been required to turn down more than 700 truckloads of Defense traffic. Accordingly, "an immediate grant of temporary authority is necessary," the Department stated, "to assure the continued availability of [AFL's] service."

Some 125 motor and rail carriers filed protests to AFL's application. Nevertheless, on September 3, 1968, Division 1 of the ICC granted AFL's application for temporary authority. (A. 143a) Between September 12 and October 6, 1968, some 60 petitions for reconsidera-

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any one of the following situations exist within their area of responsibility as outlined in V, below:

a. There is no commercial carrier authorized to render the service required by the Department of Defense.

b. *The services of authorized commercial carriers are inadequate to fulfill the needs of the Department of Defense.*

c. *Appreciably greater economy, frequency or speed of service to the Department of Defense will result.*

d. The discontinuance or abandonment of an operating authority or carrier service would be detrimental to the DoD or the proposed inauguration or expansion of an operating authority or service would be beneficial to the DoD. (Emphasis added)

tion of the Commission's order were filed by protesting carriers. In addition, a number of protestants asked that the effective date of AFL's temporary authority be postponed pending final action by the Commission on the petitions for reconsideration. (R. 2478, 2480, 2487, 2513, 2553.) The Commission denied the requests for postponement. (A. 146a-48a) AFL's temporary authority became effective on September 16, 1968. (R. 57)

On September 26, 1968, following the ICC's refusal to postpone the effective date of AFL's temporary authority, but prior to any decision by the Commission on the pending petitions for reconsideration, a number of protesting carriers, including many who had filed such petitions, filed suit in the court below. They asked the district court to stay the effectiveness of the ICC's order of September 3. The complaint sought to have the ICC's order annulled and set aside on the ground that the statement from the Department of Defense submitted in support of AFL's application failed to comply with ICC regulations prescribing the form of supporting shipper statements. On October 2 the court granted the stay (A. 166a). On October 9 the Commission responded to the stay by entering an order postponing the effectiveness of its September order. (A. 169a)

On October 16 and 18 respectively, the Defense Department and AFL filed replies to the petitions for reconsideration. (R. 3600, 3606). On November 5, 1968, the ICC issued an order noting that the Department's reply had raised additional reasons for granting AFL's application to which the protesting carriers had not had an opportunity to reply. Accordingly, it directed that the record be reopened to permit the submission of

sworn evidence on these issues. The order further provided that in view of the district court's stay order, AFL's temporary authority would remain in suspension. (A. 170a)

In accordance with the order reopening the ICC proceedings, the Defense Department, on November 20, 1968, filed the sworn statement of Mr. Vincent F. Caputo, its Director for Transportation and Warehousing Policy, the highest ranking transportation official in the Department. (A. 194a) The protesting carriers filed reply statements. On December 19, 1968 the ICC entered an order again granting AFL's application. (A. 367a). The Commission made the following findings of fact as to the transportation needs of the Department of Defense:

> (1) That, in discharging its responsibility for the conduct of the Nation's defense, it imperatively requires service over the most direct routes in a minimum transit time to effect movement of a vast quantity of numerous commodities between innumerable points and places within the United States and abroad;
>
> (2) That it has experienced inefficient and circuitous joint-line transportation by the use of existing carrier services which have been deficient for its needs, particularly relating to the coordination of the arrival of inbound shipments with the production schedules of manufacturing installations and the departure times and transshipment dates of matters and materials necessary to the national defense;
>
> (3) That it has attempted but has been unable to obtain the required and necessary type of service and knows of no carrier in a position to meet its needs;

(4) That there is nothing in this record to establish that any of the protesting carriers provide a service to meet its needs;

(5) That unless applicant is granted the temporary authority sought herein, the Department of Defense will be without an expedited and flexible service for which it has an immediate and urgent need necessary to the defense of the country; and

(6) That, in balacing the scales of public interest, it is necessary to assure that the Government's immediate and urgent transportation requirement be met by an expedited and flexible service which will be used to complement rather than replace existing services.

On December 31, 1968, a supplemental complaint was filed in the court below, alleging in substance that the new Defense Department statement still failed to comply with the Commission's regulations. (A. 371a) On January 6, 1969 the court below entered an order staying the effectiveness of the Commission's December 19 order. (A. 382a) The case was subsequently briefed and argued on the merits and on March 26, 1969 the lower court entered its judgment holding the ICC temporary authority orders of September 3 and December 19, 1968 null and void. (A. 400a)

The court held that the Defense Department statement of May 15, 1968 did not comply with the ICC regulations because it failed to provide the two categories of information called for by subsections (8) and (9) of 49 C.F.R. § 1131.2(c), namely:

(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.

(9) Names and addresses of existing carriers

> who have either failed or refused to provide the service, and the reasons given for any such failure or refusal.

In the court's view an explicit response precisely in the terms of subsections (8) and (9) was absolutely mandatory. The court further held that notwithstanding the pendency of petitions for reconsideration before the ICC—which it found to be unauthorized under ICC rules—the ICC lost jurisdiction to reopen the record once the judicial review proceeding was filed. But even if the Commission had such jurisdiction, the court held, the new statement submitted on behalf of the Defense Department in November failed to provide the information called for by subsections (8) and (9). Accordingly, the court nullified both the September 3 and December 19 orders of the ICC. (A. 400a)

In May 1969 the ICC announced the adoption of regulations, to become effective July 7, 1969, implementing a restrictive amendment to the agricultural cooperative exemption in section 203(b)(5) of the Interstate Commerce Act.* Under the new restrictions cooperatives were not to be permitted to haul more than 15 per cent of their total annual interstate tonnage for nonmembers. After the district court refused to stay its judgment nullifying AFL's temporary authority (R. 4231), AFL applied to this Court for a stay of the lower court's judgment pending this appeal. In support of its application AFL pointed out

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*On July 26, 1968, S. 752 had been enacted into law. 82 Stat. 448. That legislation was not intended to become effective, however, until the ICC had adopted implementing regulations, and in the interim the existing law relating to the agricultural cooperative exemption was to remain in effect. S. Rep. No. 1152, 90th Cong., 2d Sess. 16 (1968).

that because AFL was faced with the necessity of drastically curtailing its nonmember activities, this curtailment, which would not have been necessary but for the action of the district court in this case, threatened AFL with operating losses of hundreds of thousands of dollars and with the destruction of an organization that had taken five years of hard work to build.

In supporting AFL's stay application, the Department of Defense pointed out that as a result of AFL's lower rates, the Department had saved $1,062,300 in direct transportation costs between December 1966 and March 1969. In addition, it had saved a vastly larger amount in such indirect costs as warehousing and inventory, by using AFL's service. (A. 402a) [10] The Department stated that even a temporary cessation of AFL's service to it "would reduce DOD's ability to achieve expedited delivery of critical materials, would substantially increase the cost to DOD and the taxpayers of moving defense traffic, and would deny the public the additional safety benefit of reduced on-the-road mileage of hazardous commodities." (A. 404a)

On August 21, 1969, Mr. Justice Douglas granted AFL's stay application. (A. 422a) On August 27, 1969 the Chairman of the ICC entered an order reinstating AFL's temporary authority. AFL thereupon resumed common carrier service to the Government pursuant to its temporary authority.

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[10] The Department was required under its own policy to consider such factors in deciding whether to support AFL's application. See note 7 *supra*, at p. 7.

SUMMARY OF ARGUMENT

I.

The district court erred in holding that the Department of Defense statement in support of AFL's application for temporary authority failed to comply with the ICC's rules. Those rules called upon the Department to state whether it had requested other carriers to provide the service proposed by AFL, and, if it had, to describe the results of those requests. The Department's statement made clear that it knew of no other carriers who were authorized to provide direct, single-line service, and were thus able to meet the Department's needs for rapid deliveries of Defense materials throughout the territories that AFL proposed to serve. The Department had been without such service until December 1966 when AFL entered the field, and it was supporting AFL's application because it was threatened with a loss of that service. The statement thus substantially provided the information called for by the ICC rules. *Estes Express Lines* v. *United States,* 292 F. Supp. 842 (E.D. Va. 1968), *aff'd per curiam,* 394 U.S. 718 (1969).

II.

Even if the Defense Department's statement were deemed not to have provided the information called for by the ICC's rules, such a failure could not in and of itself be the basis for nullifying the ICC's decision to grant temporary authority to AFL. The ICC was entitled to consider other evidence offered by AFL, as well as the evidence submitted by appellees, in determining whether carriers other than AFL were authorized to provide service comparable to that of AFL. Under well settled rules of judicial

review of ICC temporary authority orders, the district court should have evaluated the ICC's action on the basis of the entire record made before the Commission, and not merely on a portion of the evidence submitted in support of AFL. If there was any evidence in the record to sustain the Commission, its action could not properly be set aside.

III.

Appellees could not conceivably have been prejudiced by the alleged failure of the ICC to enforce compliance with its temporary authority rules. The issue before the ICC was whether there were existing carriers authorized to perform direct, single-line service between points in the territories covered by AFL's application. The Department's support for AFL was not premised upon specific service failures by appellees, but upon appellees' general lack of operating authority sufficient to enable them to provide high-speed service. Appellees' only burden under the ICC rules was to state specifically whether they were willing and able to provide such service, and appellees were in a position to comply with these rules notwithstanding the Department's alleged failure to provide all the information required of it.

IV.

The record before the ICC overwhelmingly established both the Government's need for the high-speed lower cost service offered by AFL and the unavailability of such service from other carriers. The Defense Department's need was established by the fact that it had been using AFL's service since 1966 to meet its requirements for expedited deliveries, and that it is now faced with a possible loss of that service. Evidence before the ICC showed that single-line service

such as AFL's is available on less than 5 percent of the routings offered by existing common carriers serving the territories covered by AFL's application.

V.

The district court erred in holding that the ICC lacked jurisdiction to reopen the administrative record once appellees had filed a complaint and moved for a stay in the court below. At the time the complaint was filed more than sixty petitions for reconsideration were pending before the ICC. These petitions were expressly authorized by the ICC's rules. The Commission's action was thus not administratively final and ripe for judicial review until the petitions had been acted upon. However, because the ICC had refused to stay the effectiveness of AFL's temporary authority pending action on the petitions for reconsideration, appellees were entitled to invoke the jurisdiction of the district court for the limited purpose of granting such a stay. The ICC's continued consideration of the case following the filing of the complaint in the lower court was thus in no way inconsistent with the district court's jurisdiction ultimately to review the case on the merits.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT THE STATEMENT SUPPORTING AFL'S TEMPORARY AUTHORITY APPLICATION FAILED TO COMPLY WITH THE ICC'S RULES

Under Section 210a(a) of the Interstate Commerce Act the ICC has broad discretion to grant an application for temporary motor carrier authority, without hearing or other prescribed procedures, when two conditions are found to exist:

1. There must be an immediate and urgent need for the service, and

2. The territory within which the service is proposed must have no carrier service capable of meeting such need.

In its order granting temporary authority to AFL the ICC made express findings that these statutory criteria had been satisfied by AFL's application. The ICC concluded that:

1. Unless the application were granted "the Department of Defense will be without an expedited and flexible service for which it has an immediate and urgent need necessary to the defense of the country," and

2. There was nothing in the record to establish that any of the protesting carriers could provide a service that met the Defense Department needs. (A. 368a)

The district court did not dispute the ICC's finding that the Defense Department had an immediate and urgent need for AFL's service. Nor did the court consider whether the record before the ICC contained evidence supporting the Commission's finding that none of the protesting carriers could meet this need. The court simply limited judicial review to a strict parsing of the sworn statement submitted by the Defense Department in support of AFL's application. The District Court concluded that the statement had failed to say whether the Department had made efforts to obtain the service from other carriers and to describe the results of those efforts, if any were made. The court held that a "statement of these matters is mandatorily required" by the ICC's temporary authority rule, 49 C.F.R. § 1131.2(c) (8) and (9), and that in the absence of "full compliance" with these "mandatory" rules the ICC could not lawfully grant temporary authority to AFL.

As we shall demonstrate below, the Defense Department's statement substantially provided the information called for by the ICC's rules. Even if it had failed to do so, however, the Commission was not required automatically to reject the application without considering the merits and without evaluating the evidence in the record as a whole. The Commission was entitled to weigh the evidence of need offered by the Defense Department, to examine the Department's contention that it knew of no service comparable to AFL's and, by taking into account the evidence offered by the protesting carriers, to determine whether in fact comparable service was available from them. On the basis of the evidence in support of AFL, as well as protestants' evidence, the Commission properly found that the service for which the Department had shown an immediate and urgent need was simply not available from carriers other than AFL.

The lower court's conclusion that the ICC rules are "mandatory", and that the Commission cannot weigh and evaluate the evidence unless there is strict compliance with these rules, is flatly at variance with the decisions of other courts, including this Court. More important, it has the effect of imposing needless and wholly unwarranted procedural encumbrances on the temporary licensing process — a process that the controlling statute expressly contemplates will be summary in nature to accommodate the national interest in an efficient and modern transportation system that can meet a variety of urgent needs.

A. The Defense Department Statement Substantially Complied With the ICC's Rules

A fair reading of the Defense Department's statement in support of AFL's application clearly shows that it substantially compiled with the ICC's temporary authority rules—and particularly with subparagraphs (8) and (9) of 49 C.F.R. § 1131.2(c), which call for information concerning the Department's efforts to obtain service from other carriers.

In evaluating this statement, it is important to keep in mind that neither subparagraphs (8) and (9), nor anything else in the Interstate Commerce Act or the ICC's regulations, require a shipper supporting such an application to *make* efforts to obtain the proposed service from others. The regulations simply call for a disclosure whether such efforts have been made. If they have been made the shipper is asked to describe the results of its efforts. As appellees themselves concede, a supporting shipper who simply stated that it had made no efforts to obtain the proposed service from other carriers would be in full compliance with the ICC's rules prescribing the content of supporting shipper statements.[11]

The Defense Department's statement concededly did not state *in haec verba* that the Department had made

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[11] Motion to Affirm of Consolidated Freightways Corp. of Delaware et al. p. 26, n. 24. Of course, even full compliance with these regulations does not necessarily mean that the application must be granted. The ICC would still have to resolve the ultimate questions posed by section 210a of the Interstate Commerce Act, namely, (1) whether the shipper has an immediate and urgent need, and (2) whether comparable service is in fact available from other carriers. Appellees' contention is that failure to comply with the regulations requires automatic denial of the application even if the record as a whole would support a grant of the application under these standards.

no efforts to obtain the proposed service from other carriers. The entire thrust of the statement, however, was that the Department of Defense, the nation's most experienced shipper,[12] *knew* of no carrier or carriers whose operating authorities allowed them to provide the type of high-speed service available from AFL throughout the territory covered by the application.[13] The statement pointed out that prior to AFL's entry into the field the Department had had to live without such service. (A. 206a) Moreover, the statement made clear that since it entered the field AFL had met the Department's need for this type of service in excellent fashion. Accordingly, AFL submits that the statement substantially provided the information called for by subsections (8) and (9). The Department's statement showed that, based upon its extensive experience as a shipper, it viewed AFL's service as being qualitatively different from the service available from existing carriers, and that since late 1966 it had been relying on AFL to fill an urgent specialized need for rapid deliveries.

This qualitative superiority of AFL's service was possible, in the Department's view, because AFL provided direct, single-line movements. By contrast, most

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[12] The experience of the Defense Department obviously dwarfs that of all other shippers in the United States. In fiscal year 1968 (the last full year for which figures are available), the Department shipped 64 billion pounds of material at a cost of $599 million. These figures do not include contract air shipments and the movement of household effects. DOD, Military Traffic Management and Terminal Service, Quarterly Progress Report, Third Quarter FY 1969, p. 8.

[13] The ICC expressly found, in granting AFL's application, that the Defense Department's statement established that the Department knew of no carrier in a position to meet its needs. (A. 368a)

service available from other carriers required joint-line participation by two or more carriers over prescribed and often circuitous highway routings. The practical measure of this qualitative difference was clearly stated: Where joint-line, regular-route service is involved, such as provided by the protestants, the Department allowed 24 hours transit time for each 300 miles of distance to the destination; however, where single-line irregular-route service was available, such as that provided by AFL, the Department computed transit times on the basis of 8 hours for each 300 miles. *In other words, the Department viewed AFL's services as three times faster than that available from other carriers.*

The Department set forth a number of specific instances when AFL had provided expedited delivery that could not, to the best of its knowledge, have been provided by other carriers. (A. 207a-208a) In addition, it tabulated the major Defense installations between which there was not, to its knowledge, any carrier authorized to provide direct, single-line service. Finally, the Department made clear that AFL had been meeting its needs for expedited delivery since 1966 and that it was supporting the application because the Government was faced with a loss of AFL's service.

In short, the Department's response to the requirements of subparagraphs (8) and (9) was that it had not requested the proposed service from other carriers because AFL had been meeting its needs for such service and because it believed, on the basis of its experience as a shipper of vast quantities of goods, and on its knowledge of the operating authorities of other

carriers, that no service qualitatively comparable to AFL's was available from other carriers.[14]

That such a response was sufficient to comply with the requirements of subsections (8) and (9) is clearly established by this Court's decision in *Estes Express Lines* v. *United States*, 394 U.S. 718 (1969), *affirming per curiam*, 292 F. Supp. 842 (E.D. Va. 1968). In *Estes*, as in this case, the shipper supporting the application for temporary authority was already being served by the applicant, and was faced with imminent curtailment of that service. In each case the shipper expressed the view that no other carrier could provide service of equivalent quality and scope. In *Estes*, the district court held that the shipper's explanation of these circumstances reasonably complied with subsections (8) and (9), and this Court affirmed summarily. The present case cannot be distinguished from *Estes* in this regard, and it would be unreasonably technical to hold that compliance with subsections (8) and (9) required more than what was provided in the Department's statement.

B. The Court Below Erred In Holding The ICC's Rules To Be "Mandatory"

Even if the Defense Department's support statement were read narrowly as failing to provide the information called for by subsections (8) and (9) of 49 C.F.R. § 1131.2(c), such failure cannot itself be the basis for nullifying the Commission's decision granting the ap-

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[14] If the Department's conclusions were erroneous, and comparable service was in fact available from other carriers, it was well within the ability of the protesting carriers to establish this by their own evidence. The district court did not reach this question, however, because it erroneously held that the Department had failed to state whether it had requested the service from other carriers.

plication on the merits. A holding that these rules are "mandatory" simply invites technical and purposeless precedural haggling among the parties and diverts attention from the only meaningful issue in cases such as this, namely, whether the record as a whole contains evidence to support the ICC's decisions.[18]

The ICC's rules relating to temporary authority applications, which were adopted to 1965, set forth in detail the procedures for the processing of such applications. Section 1131.2(c) of these rules provides that each application must be accompanied by a supporting statement from the shipper requiring the proposed service. It further outlines 11 categories of information to be covered by the supporting statement. When an application is filed, a summary of the authority sought is then published in the Federal Register, and interested parties are given 15 days in which to file protests. The only information called for in the protest is a specific statement by the protesting carrier "as to the service which such protestant can and will offer". 49 C.F.R. § 1131.3(a) (2). No provision is made for the filing of a reply by the applicant to such protests.

The rules thus carry out the aim of the statute in establishing a summary procedure. Cross-examination, direct reply and rebuttal are not contemplated; protests may be framed solely in reference to the published summary description of the operating authority sought by

[18] It is noteworthy that the district court that decided this case is the only court in the country that has accepted the argument that these rules are "mandatory." Its decision in this case was based upon its earlier decision in *Acme Cartage Co.* v. *United States*, 290 F. Supp. 453 (W.D. Wash. 1968). Following the decision in *Acme* the argument gained great currency among disappointed carriers who were attacking ICC temporary authority orders, but, as pointed out *infra*, the district courts have repeatedly rejected it.

the applicant. Section 210a of the Interstate Commerce Act contemplates that the ICC, as the agency primarily responsible for administering national transportation policy, will weigh the gravity of the need asserted by the shipper and evaluate the capability of protesting carriers to serve that need. If errors of fact or judgment are made by the Commission in granting temporary authority, their impact is ameliorated by the relatively short duration of the authority and by the opportunity to employ more refined fact-finding procedures in considering an application for corresponding permanent authority.[16]

In a policy statement issued in January 1968, the ICC made clear that the intent of its temporary authority rules is to facilitate its processing of the more than 5,000 applications for temporary authority it receives annually. 2 CCH Fed. Carr. Rep. ¶ 23114. The Commission stated that because of inadequate preparation of many applications, it frequently "has found it difficult to reach an informed and equitable decision." In many cases, it pointed out, further investigation by the ICC staff has been required. Accordingly, the Commission announced that it would deny applications that did not "adequately comply" with its rules where "because of non-compliance . . . , a fair adjudication is not possible on the record before the Commission". *Ibid.*

Thus, the evident purpose of the rules was to ease the Commission's burden of processing applications that do not provide sufficient information for the Commission to exercise its discretion. Neither the Commission nor any reviewing court other than the court below has

[16] AFL's application for permanent authority identical in scope to the temporary authority granted in this case is presently pending before an ICC hearing examiner.

ever suggested that the temporary authority rules—particularly that portion of the rules prescribing the content of supporting shipper statements—were intended for the benefit of protesting carriers. Indeed, it would be flatly inconsistent with the purpose of the rules—to expedite the processing of temporary authority applications—to interpret them in a way to encourage argumentation over fine points of procedure. The instant case demonstrates the mischievous results of such interpretation.

All other courts, including this Court, that have been presented with the contention that these rules are "mandatory" have rejected the argument. It was implicitly rejected when this Court summarily affirmed the district court in *Estes Express Lines* v. *United States,* 394 U.S. 718 (1969),[17] and was explicitly rejected in *Bell Lines, Inc.* v. *United States,* 1 CCH F. Carr. Rep. [1969 F. Carr. Cas.] ¶ 82139, at 54661 (S. D. W. Va. 1969), *appeal docketed,* No. 893, 1969 Term, Nov. 28, 1969, where the court stated that

> The eleven rules of the Commission relating to the contents of letter statements supporting applications for temporary authority are not legal absolutely but administrative guidelines.

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[17] The first question presented for review by the appellants in *Estes* was "Whether the Interstate Commerce Commission is bound by its own regulations governing the issuance of temporary authority franchises to motor carriers under Section 210a(a) of the Interstate Commerce Act." Juridictional Statement, pp. 2-3, *Estes Express Lines* v. *United States,* 394 U.S. 718 (1969).

It was also rejected in *Superior Trucking Co.* v. *United States,* 302 F. Supp. 257, 263-64 (N.D. Ga. 1969);[18] *Roadway Express, Inc.* v. *United States,* 263 F. Supp. 154 (N.D. Ohio 1966); and *Hussey* v. *United States,* 271 F. Supp. 650 (N.D. Cal. 1965).[19]

In the present case the considerations that underlay the Commission's rules were clearly not present. Quite obviously the Commission believed that there was adequate information before it to permit an adjudication of the issues presented. No further investigation was necessary by the staff, and the Commission had no difficulty making the findings required by the statute. Because the temporary authority rules were adopted by the Commission to ease its own burden in processing applications, there is no useful purpose in argument addressed to technical compliance with the rules. The only relevant question for the reviewing court is whether there was evidence to support the conclusion reached by the Commission.

Appellees have attempted to direct attention away from the substantive merits of the case by alleging that the ICC's failure to enforce its regulations against AFL violated the rule established in cases involving personal civil liberties, such as *Service* v. *Dulles,* 354

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[18] In *Superior* the court stated (302 F. Supp. at 263)

> The regulations were designed to facilitate the Commission's findings of an urgent and unmet need; if facts supporting these findings exist in the record, the fact that the regulations were not strictly followed should be irrelevant. It is particularly inappropriate to strictly bind an agency to regulations made under a statute designed to encourage summary procedures.

[19] In *Hussey* the argument was raised in Plaintiff's Reply Brief to ICC Motion to Cancel Further Argument, pp. 10-12, and was rejected without comment by the court.

U.S. 363 (1957) and *Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954). The essence of their argument is that the ICC was obligated to make a preliminary evaluation of the statement supporting the AFL's application, and if that statement did not provide every bit of the information called for by the temporary authority rules, to deny the application automatically—*even if the record as a whole contained evidence that would support a grant of temporary authority under the statutory standards.*

To accept appellees' argument would be to cause a retrogressive change in the nature of ICC temporary authority proceedings, and would serve no purpose other than to provide entrenched carriers with additional opportunities to raise procedural obstacles to the entry of new competitors. Moreover, under its present practice the ICC determines whether a proposed temporary service is available from existing carriers by considering the evidence submitted in support of the application and by weighing the statement of protesting carriers as to their own willingness and ability to provide the service. If such statements disclose that the protestants are not capable of providing service comparable to that proposed by the applicant, the application may be granted.

This procedure was expressly sanctioned in the *Estes* case, where this Court summarily rejected the very contentions advanced in this case. In *Estes* the district court held that whether or not the supporting shipper had given a sufficient response to subsections (8) and (9), the Commission could, in applying the statutory criteria, base its decision on "the failure of the carriers to allege facts showing that they were providing transportation comparable in all respects" to that proposed

by the applicant. *Estes Express Lines* v. *United States*, 292 F. Supp. 842, 844 (E.D. Va. 1968), *aff'd per curiam*, 394 U.S. 718 (1969). In affirming the district courts's decision, this Court made clear that ICC temporary authority orders should be reviewed on the entire record before the Commission, and should not be subjected to the kind of hypertechnical piecemeal scrutiny suggested by appellees.

C. Appellees Could Not Have Been Prejudiced by the ICC's Alleged Failure to Enforce Its Own Rules

Even if it is assumed that the Defense Department statement supporting AFL's application was "deficient" because it failed to state whether the Department had requested the proposed service from other carriers, the appellees could not conceivably have been prejudiced by that "deficiency."

Appellees appear willing to concede that "a showing of prejudice is essential" when the *Service-Accardi* rule is invoked as grounds for overturning agency action.[20] However, their claim of prejudice resulting from the ICC's alleged failure to enforce subsections (8) and (9) of the temporary authority rules is clearly insufficient to warrant nullification of the Commission's decision.

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[20] Motion to Affirm of Consolidated Freightways Corp. of Delaware et al., p. 28. Appellees state that "the one court squarely presented with the issue" whether a showing of prejudice is essential declined to pass on it. However, a recent decision by the United States Court of Appeals for the District of Columbia Circuit has squarely decided the issue. In *National Capital Airlines, Inc.* v. *CAB* F.2d No. 22,634, September 12, 1969) the court rejected an attack on a CAB order, where the attack was based on claims of violations by the Board of its own procedural rules, on the sole ground that the petitioner had not been prejudiced by any of the alleged violations.

Appellees claim that because the Defense Department did not state whether it had requested the proposed service from other carriers and did not detail any service failures, appellees were unable to frame protests to the application with specificity. Had the Department given a detailed catalogue of service failures, appellees argue, the protestants might have been able to submit evidence directly disputing the Department's allegations.

There are two difficulties with appellees' argument: First, in requiring supporting shippers to describe their efforts, if any, to procure the proposed service from other carriers, the ICC evidenced no intent whatsoever to benefit protesting carriers or to enable them to frame specific rebuttals. As indicated above, the Commission adopted these rules as guidelines for the presentation of evidence to ease the Commission's own burdens in processing temporary authority applications. The rules do not call upon protesting carriers to explain away alleged deficiencies or otherwise to produce evidence disputing the supporting shipper's statement. The rules call upon such carriers to do only one thing: to state with specificity "the service which such protestant can and will offer," 49 C.F.R. § 1131.3(a)(2), a statement that may be framed solely in response to the Federal Register summary of the operating authority sought by the applicant.

Second, in the present case, the Defense Department's support of AFL's application was not premised upon specific service failures by other carriers. It was premised upon the more general and rather obvious proposition that direct single-line service is faster and safer (a particularly important consideration where many tons of explosives are being transported) than

circuitous multiple line service.[21] As the Department pointed out, "service offered by currently authorized motor carriers for the movement of DOD traffic between points in the involved territories is not generally available upon a single line irregular route basis." (A. 199a) Evidence submitted by AFL showed that single-line service was available in less than 5 percent of the routings of existing major carriers between Government installations in the territory covered by the application. See p. 38, *infra*.

The real issue, therefore, was whether direct single-line service was available to the Government to any meaningful extent. If protesting carriers were able to offer such service, their burden under the Commission's rules was to state that fact with specificity. The evidentiary issue was thus clearly and broadly drawn, and the alleged failure of the Defense Department to detail specific efforts to obtain direct single-line service from existing carriers could not conceivably have prejudiced the protestants' ability to discharge the burden imposed upon them by the rules.

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[21] The obviousness of this proposition is evidenced by the fact that because of the Defense Department's successful support of AFL's application "regulated motor carriers with restricted authority are now able to seek improved operating rights and more than 125 have done so." Motion to Affirm of American Trucking Associations, Inc., et al., p. 6, n. 18. The Department's support for these applications has been based upon the same considerations as in this case.

II. THE RECORD BEFORE THE ICC CONTAINED AMPLE EVIDENCE TO SUPPORT THE COMMISSION'S GRANT OF AUTHORITY TO AFL

It is the well-established rule that a decision of the ICC granting temporary operating authority under section 210a(a) of the Interstate Commerce Act must be sustained if there is

> Any evidence in the administrative record which tends to show that the temporary authority provides a service "for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such a need. . . ."

Roadway Express, Inc. v. *United States,* 263 F. Supp. 154, 157 (N.D. Ohio 1966). See also *Hussey* v. *United States,* 271 F. Supp. 650 (N.D. Cal. 1965); *Merchants Delivery Co.* v. *United States,* 265 F. Supp. 669 (W.D. Mo. 1967); *Union Cartage Co.* v. *United States,* 244 F. Supp. 1005 (D. Mass. 1965).[22] AFL submits that the voluminous record in this case contained more than

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[22] The rule is clearly established that the "substantial evidence" test need not be met on review of ICC temporary authority orders. See *Bell Lines, Inc.* v. *United States,* 1969 CCH Fed. Carr. Cas. ¶ 82139 (S.D. W.Va. 1969); *Superior Trucking Co.* v. *United States,* 302 F. Supp. 257, 261 (N.D. Ga. 1969); *Merchants Delivery Co.* v. *United States, supra.* In *Superior Trucking, supra,* 302 F. Supp. at 257, the district court stated that

> "in order to uphold the Commission's decision, we need find only some evidence in the record, so the Commission cannot be said to have acted arbitrarily and capriciously or to have abused its discretion."

ample evidence to support the ICC's grant of temporary authority to AFL.[23]

The direct evidence in support of AFL's application consisted of (1) a two page letter of support originally submitted by the Department of Defense (A. 14a), (2) a 22-page sworn statement submitted by the Department of Defense after the proceeding was reopened (A. 194a), and (3) a 210-page series of exhibits submitted by AFL comparing AFL's proposed service between some 275 Government installations in the territory covered by the application with the service available from the leading protestant carriers. (R. 1761-1970). This evidence showed as follows with respect to the statutory criteria:

Need for the service: Between August 1, 1967, and June 30, 1968, the Defense Department required service in the territory covered by AFL's application for more

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[23] In view of its decision on this procedural issue, the district court did not reach the substantive question whether the record contained evidence to support the Commission's decision. The parties are in agreement that it is appropriate for this Court to consider the question at this time. See Motion to Affirm of Consolidated Freightways Corp. of Delaware, et al., p. 3 n. 2. Accordingly, in the event the Court finds that the lower court was in error in nullifying the ICC decision for supposed procedural defects, there is no need to remand the case for further proceedings in the district court. This Court is as able as the district court to resolve the remaining substantive issue on the basis of the record made before the ICC. Indeed, AFL believes the Defense Department's supporting statement in and of itself is sufficient basis for upholding the ICC decision on the merits. In any event, in view of the fact that this case ivolves a transportation service immediately and urgently needed by Government and that well over a year has elapsed since the ICC first authorized this service, appellant respectfully submits that the case should be disposed of on the merits without further delay. *See SEC* v. *National Securities, Inc.*, 393 U.S. 453, 464-65 (1969).

than 1.9 billion pounds of freight. Some 50 items of freight were listed as representative of the thousands of articles and commodities shipped (A. 197a), and 70 typical origin and destination points were identified. (A. 196-7a) A substantial portion of the freight shipped by the Department must move on an expedited basis to air bases and ports for transshipment overseas. In addition, it is necessary in many instances for the Department to make precisely timed deliveries of materials at manufacturing installations. Such deliveries must be coordinated with production schedules. For example, empty shell cases delivered to the Louisiana Army Ammunition Department and the Pine Bluff Arsenal in Arkansas are fed directly into the production line from the delivery vehicle. (A. 204a).

In addition to its specific need for expedited delivery to meet production and export schedules, the Department has a general obligation to conduct its operations in the most efficient and economical means possible.[24] It is constantly looking for means of shortening the supply "pipeline" by reducing the time it takes to ship goods from manufacturing points to points of export. Longer transit times simply result in higher costs to the taxpayer. (A. 14a, 204a)

In 1966 a number of agricultural cooperatives solicited traffic from the Defense Department for movement under their exemption from economic regulation. (A. 206a) In December 1966, the Department began to use AFL to meet its needs for high-speed precisely timed deliveries (A. 206a), and between December 1966, and

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[24] *See, e.g.*, National Security Act of 1947, as amended, 72 Stat. 514, 50 U.S.C. § 401 (1964) ("to provide more effective, efficient and economical administration in the Department of Defense").

June 30, 1968, AFL transported more than 74 million pounds of freight for the Department. (A. 207a) AFL fully met the Department's need for expedited delivery and its service was considered by the Department to be "excellent in every respect." (A. 12a) In addition, AFL's service was considered to be particularly important as a yardstick against which to measure the capabilities of other carriers.

The immediacy and urgency of the Department's need for AFL's service derived from the fact that the Department was faced with a substantial curtailment of the service it had been receiving from AFL for almost two years.[25] The Department pointed out in its May 15, 1968, letter of support that by reason of the injunctions entered against AFL by the district court in Oklahoma, AFL had already been forced to turn down over 700 truckloads of Defense traffic, whereas prior to the injunction it had carried approximately 300 truckloads per month for the Department. (A. 15a) In the verified supporting statement filed in November, 1968, the Department additionally pointed out that by reason of the July 1968, amendment to section 203 (b) (5) of the Interstate Commerce Act, severely limiting the nonmember traffic that agricultural cooperatives could handle, AFL's ability to serve the Department in the future would be even more drastically reduced. The Department noted that it was supporting AFL's application for permanent authority, and it urged the Commission to grant AFL's application for temporary

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[25] See 49 C.F.R. § 1131.4(b)(2) (immediate and urgent need may be shown by "a discontinuance of existing service"); *Superior Trucking Co.* v. *United States*, 302 F. Supp. 257, 261-62 (N.D. Ga. 1969).

authority to prevent any interruption in this valuable service. (A. 208-09a)

Finally, the ICC could have taken note of the obvious fact that direct single-line transportation of hazardous materials, such as explosives, reduces the exposure of the public to the risks involved in moving such commodities. Indeed, as the Department pointed out to the court below (A. 402a-403a) at the very time AFL's application was before the ICC, the State of California, supported by the Department of Transportation, had petitioned the ICC to adopt rules *requiring* carriers of hazardous materials to travel by the "nearest, direct route."

Unavailabilty of qualitatively equal service from other carriers: It is amply clear from the Department's supporting statements that its need related to the *type* of service available to it—specifically to the speed and timing of such service. No claim was made that the Department was unable to move freight between any points in the territory covered by the application. Thus, the factual issue before the ICC was whether carriers other than AFL were able to provide the Government with service that was as fast as AFL's.

The Defense Department's statement pointed out that there were three factors that distinguished AFL's operations from those of other carriers and that disabled the other carriers from providing service as fast as that of AFL:

First, the majority of all certificated service available to the Department is provided on a joint-line basis—that is, two or more carriers are required to complete a shipment from origin to destination. (A. 198a)

Second, virtually all certificated carriers are required to follow regular routes set forth in their certificates. Thus, even where single-line service is available the carriers routes are often circuitous, adding hours to transit times. (A. 199a)

Third, some carriers follow the practice of switching drivers and power units at relay points along their routes, thus causing shipment delays. (A. 199a)

By contrast, AFL provides service on a single-line, direct-route basis, using two-man driver teams, and has, in the Department's view, thus been able to provide service superior to that available from other carriers. (A. 206a)

The practical significances of these differences from the viewpoint of the Defense Department can be summarized as follows: Where joint-line, irregular route service is involved, the Department allows 24 hours transit time for each 300 miles of distance to the destination. However, where single-line, regular route service such as AFL's is available, the Department can plan on transit times that are three times as fast, namely, eight hours for each 300 miles. (A. 198-99a)

As illustrative of the superiority of AFL's service, the Department described in detail five instances in which its specific requirements for expedited delivery were met by AFL, where, based upon the Department's experience, joint-line service could not have satisfied its requirements. In addition, the Department set forth in detail a tabulation of the major Government installations in the territorities covered by AFL's application between which there was no carrier authorized to provide direct, single-line service. This list identified more than 30 pairs of specific points between which no single-

line service was available, and more than a dozen additional points from which no single-line service was available to any point in one or more of the territories AFL proposed to serve.

Finally, AFL itself submitted a minutely detailed comparison of the service available between more than 275 military origin and destination points from AFL, on one hand, and, on the other, the seven leading common carriers hauling munitions for the Government.[26] (R. 1761) These exhibits showed the various routings that were available to the Department from the common carriers and generally compared the mileages involved in these routings with those available from AFL. In addition, the exhibits showed the number of joint-line carriers participating in each routing.

Of a total of approximately 2,030 routings available from carriers other than AFL only 93—or approximately four percent—were available on a single-line basis.[27] By contrast, direct single-line service was available from AFL between every origin and destination point shown on the exhibits.

AFL submits that this direct evidence in support of the application overwhelmingly demonstrated that the Government had an immediate and urgent need for AFL's service that could not be met by existing carriers.

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[26] These seven carriers are Consolidated Copperstate Lines, Navajo Freight Lines, Inc., Ringsby Truck Lines, Inc., T.I.M.E. Freight, Inc., Tri-State Motor Transit Co., Western Gillette, Inc., and Riss & Co., Inc.

[27] Four hundred and fifty routings required joint-line service from two carriers; 960 required service from three carriers; 424 required service from four carriers; and 99 required service from five connecting carriers.

III. THE DISTRICT COURT ERRED IN HOLDING THAT THE ICC LACKED JURISDICTION TO REOPEN THE ADMINISTRATIVE RECORD.

As an alternative ground for nullifying the ICC's grant of temporary authority to AFL, the district court held that the Commission lacked jurisdiction to reopen the administrative record once a complaint had been filed seeking judicial review. This holding was clearly erroneous.

The administrative proceeding had not been completed when the complaint below was filed because there were some 60 petitions for reconsideration pending before the ICC. Indeed, when the complaint was filed it was the clear recognition of the parties that the agency proceeding had not been terminated. The jurisdiction of the district court was properly invoked at that time, under recognized procedures, solely to obtain interlocutory relief pending final action by the Commission, and the Commission's decision was not ripe for plenary review on the merits until the petitions for reconsideration had been acted upon.

A careful examination of the chronology of events in September 1968 provides an expose of the frivolous nature of appellees' argument.

The Commission's first decision granting temporary authority to AFL was entered on September 3, 1968 and served on the parties on September 5. (A. 143a). Beginning as early as September 12, 1968, more than 60 of the protesting carriers filed petitions for reconsideration of that order. Because the Commission's order was effective almost immediately, however, a number of these carriers asked the Commission to stay the effective date of AFL's temporary authority until it

could pass upon the pending petitions. Between September 11 and 16 the ICC denied the requests for a stay. (A. 146-48a) AFL's authority became effective on September 16. (R. 57.)

Appellees were thus faced with an obvious dilemma: The ICC had not yet acted on their petitions for reconsideration, yet AFL was free to commence operations under its temporary authority. Appellees sought to resolve their problem in a manner long sanctioned by this Court—that is, by filing suit against the Commission *prior* to completion of the agency proceeding and by simultaneously moving for a stay of the ICC's order. Their complaint and motion were filed in the district court on September 26, 1968. At this time the period for filing petitions for reconsideration of the September 3 order had not yet expired and neither AFL nor the Defense Department had had an opportunity to reply to the petitions that had already been filed.[28] On October 2, 1968 the court below entered an order staying the effectiveness of AFL's temporary authority. (A. 166a.)

It is amply clear that on September 26, when the complaint was filed and a stay of the ICC order was sought, the appellees were nevertheless fully prepared to continue with the pending proceeding before the ICC. Moreover, at that time neither the appellees nor the court below perceived any inconsistency or conflict between the preliminary exercise of judicial juris-

[28] Under the ICC's General Rules of Practice, petitions for reconsideration of the ICC's order of September 3, 1968 would have been in time if filed by October 7, 1968. 49 C.F.R. §§ 1100.21(a), 1100.101(e), AFL and the Defense Department had until October 27, 1968 to file replies to such petitions. 49 C.F.R. § 1100.23(b).

diction and the continued consideration by the ICC of the petitions for reconsideration pending before it. This common understanding is evidenced by the following facts:

1. Eight of the ten original plaintiffs in this action had petitions for reconsideration pending when they moved the district court to stay the ICC's order. All of these petitions were filed *after* the ICC refused to stay the effectiveness of the September 3 order, and several were filed within three days prior to the filing of the complaint in this action. (R. 2499, 2513, 2529, 2588, 2621, 2626, 2637, 3521.) These parties thus clearly disclosed an intention to continue litigating before the ICC while concurrently seeking anticipatory relief in court.

2. While appellees asked the district court to stay the effectiveness of the ICC's order of September 3, they did not ask the court to stay further proceedings before the Commission, again showing their willingness to continue with the ICC proceeding. (A. 149a).

3. Although the ICC, in opposing appellees' stay motion, expressly called the district court's attention to the fact that some 60 petitions for reconsideration were then pending before the ICC (R. 57), the court's stay order did not in any way forbid the ICC from considering and acting on these petitions or from otherwise continuing with the case before it. (A. 166-67a)

4. On October 6, 1968, four days *after* the court below entered its stay order, three more of the appellees petitioned the ICC for consideration of its September 3 order. (R. 3587, 3595.)

5. Replies to the pending petitions for reconsideration were filed by AFL and the Defense Department

on October 16 and 18, 1968 (R. 3600, 3606). None of the appellees suggested that such replies were inappropriate because the court had obtained exclusive jurisdiction.

6. In its reply to the petitions for reconsideration, AFL asked the ICC to reopen the record to receive additional evidence (R. 3615), and none of the appellees attempted to invoke the court's jurisdiction to prevent such reopening. The American Trucking Associations, Inc. filed a lengthy opposition to these requests to reopen, but their opposition was significantly devoid of any suggestion that the ICC lacked jurisdiction to proceed further. Indeed, ATA renewed an earlier motion to strike certain evidence from the record, thus clearly indicating its acceptance of the ICC's jurisdiction. (R. 3705) Similarly, appellee Tri-State Motor Transit Co. urged, without suggesting any jurisdictional infirmity, that if the Commission decided to reopen the record, it should set the matter for oral hearing. (R. 3671)

7. Most significantly, appellees did not file the record of the ICC proceedings with the court below until January 24, 1969 (A. 6a), more than a month after the ICC had reopened the record and had issued a new order granting temporary authority to AFL.[29]

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[29] There is additional evidence of the lack of substance in appellees' argument that the ICC lost jurisdiction when the complaint was filed. On September 9, 1969, after Mr. Justice Douglas entered an order staying the lower court's decision and permitting AFL's temporary authority to take effect, the Munitions Carriers Conference, Inc., a unit of the American Trucking Associations that had itself appeared as a protestant, moved the ICC to reopen the record and to reconsider and deny AFL's application notwithstanding the fact the case was pending in this Court. Apparently the Conference had forgotten that its parent body, ATA, had successfully persuaded the district court, and was arguing in this Court, that the ICC lacked jurisdiction to reopen.

The facts outlined above illustrate the awkward situation in which appellees find themselves today. They are now attempting to extricate themselves by arguing that their own petitions for reconsideration were unauthorized by the ICC rules, and that the ICC order of September 3, 1968 was therefore fully ripe for judicial review when the complaint was filed. Notwithstanding the astonishing candor of the industry's leading trade association and some of the country's foremost truckers in belatedly confessing ignorance of the ICC's rules, their contention is simply wrong. Rule 101(g) of the ICC's General Rules of Practice, 49' C.F.R. § 1100.101(g) expressly provides[30] that when an appellate division of the Commission reverses the decision of a Commission board, a petition for reconsideration may be filed by any party adversely affected by the appellate division decision. That rule precisely covers the situation presented in this case: AFL's application had originally been denied by the ICC's Temporary Authorities Board. (A. 141a.) On review of that decision, Division 1 of the Commission, acting as an appellate division, reversed the Board on September 3, 1968. (A. 143a) Appellees were thus entirely correct in their original judgment that they were entitled to file petitions for reconsideration of the September 3, order.[31]

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[30] Rule 101(g) is set forth in full in Appendix A hereto.

[31] Appellees have suggested that Rule 101(g) of the General Rules of Practice was implicitly superseded by the ICC's later-adopted rules relating to temporary authorities. There are two difficulties with this position: First, the ICC itself has stated that Rule 101(g) permitted the filing of these petitions. (R. 57). It can not seriously be argued, therefore, that the Commission intended to supersede this rule. As this Court has pointed out, great deference should be given to an administrative agency's interpretation

It has been clearly established since this Court's decision in *Oklahoma Natural Gas Co.* v. *Russell,* 261 U.S. 290 (1923) that the jurisdiction of a district court may be invoked for the purpose of obtaining interlocutory relief from an order of an administrative agency prior to completion of the administrative proceeding. Indeed, *Oklahoma Natural Gas* presented a situation remarkably similar to the instant case. In that case two natural gas companies had applied to a state regulatory agency for permission to increase their rates, and the agency had denied the requests. An appeal was taken to the state Supreme Court, which had power, acting in a legislative capacity, to fix natural gas rates and, pending action by it, to permit the proposed rates to take effect under a supersedeas. The Oklahoma court denied a supersedeas, however. Before the court had decided the case on the merits, the companies filed suit in a federal court asking for preliminary and permanent injunctions against the allegedly confiscatory rates they were being forced to charge. The Supreme Court held that notwithstanding the pendency of the state proceeding it was appropriate for the district court to grant a preliminary injunction allowing the higher rates to take effect until the state proceeding had ended and the federal court could review the merits.

A similar result was obtained in cases involving the Interstate Commerce Commission. In *Pacific Inland*

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of its own regulations. *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965). Second, the temporary authority rules themselves expressly provide for the filing of petitions for reconsideration "pursuant to and in accordance with the Commission's General and Special Rules of Practice." 49 C.F.R. § 1131.6(a). Thus, far from superseding Rule 101(g) of the General Rules when it adopted the temporary authority rules, the Commission expressly incorporated it.

Tariff Bureau v. *United States,* 129 F. Supp. 472 (D. Ore. 1955) and *Cantlay & Tanzola, Inc.* v. *United States,* 115 F. Supp. 72 (S.D. Cal. 1953) the courts expressly sanctioned the very procedure followed by appellees here. In both cases the parties were unable to procure interlocutory relief from the ICC during the pendency of petitions for reconsideration before the Commission; in each case a complaint was filed against the ICC and a temporary restraining order was entered pending final action by the ICC and review on the merits by the court.[32]

While this Court need not decide the question, AFL contends that petitions for reconsideration were *required* to be filed by appellees before the ICC's order of September 3, 1968 was ripe for judicial review on the merits.[33] But even if such a petition for reconsidera-

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[32] It is noteworthy that in both the *Pacific Inland Tariff* case and *Cantlay & Tanzola* case, the jurisdiction of the district court to grant interlocutory relief was challenged on the ground that because petitions for reconsideration were pending the plaintiffs had not exhausted their administrative remedies. In both cases this argument was rejected. The court in *Cantlay & Tanzola* stated (115 F. Supp. at 76) that

> the danger of immediate and irreparable injury to plaintiffs, had they awaited action of the Commission on their petition for reconsideration, was sufficiently clear to warrant judicial intervention in advance of final administrative action, by way of exception to the "long-settled rule of judicial administration . . . that no one is entitled to judicial relief for a . . . threatened injury until the prescribed administrative remedy has been exhausted."

[33] Section 17(9) of the Interstate Commerce Act, 49 U.S.C. § 17(9) expressly provides that a decision of the Commission or an appellate division of the Commission may be subjected to judicial review after a petition for reconsideration has been denied "but not otherwise." *Cf. Southland Indus.* v. *FCC,* 99 F.2d 117 (D.C. Cir. 1938). The Court need not decide this issue, however, because the ICC had denied appellees' petitions for reconsideration prior to the time the court below considered the case on the merits.

tion were not mandatory, the protesting parties clearly had a right to ask the ICC to reconsider before they sought judicial review on the merits of the agency decision. *Cf. Resort Bus Lines, Inc.* v. *ICC,* 264 F. Supp. 742, 745 n. 6 (S.D.N.Y. 1967). Where permissive rehearing is sought "there is no final action until the rehearing is denied." *Outland* v. *CAB,* 284 F.2d 224, 227 (D.C. Cir. 1960) (Burger, J); *accord Samuel B. Frankin & Co.* v. *SEC,* 290 F.2d 719, 724 (9th Cir.) (*en banc*) *cert. denied,* 368 U.S. 889 (1961). Moreover, where a petition for rehearing is permissive and some parties file such petitions while other parties proceed directly to seek judicial review, the agency retains jurisdiction to decide the petitions notwithstanding the fact that judicial jurisdiction has attached. "That both tribunals have jurisdiction does not mean, of course, that they will act at cross purposes." *Wrather-Alvarez Broadcasting, Inc.* v. *FCC,* 248 F.2d 646, 648-49 (D.C. Cir. 1957). Obviously, where multiple parties are involved the right of one party to seek rehearing should not be frustrated by the decision of another party to seek judicial review without giving the agency an opportunity to reconsider.[34] *Id.*

It is perfectly clear, moreover, that in this case the ICC and the district court were not acting at cross

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[34] Many cases have pointed out that it is in the public interest to allow an agency to reconsider its decision prior to the invocation of judicial review. *E.g., The California Co.* v. *FPC,* 411 F.2d 720 (D.C. Cir. 1969); *Pan American Petroleum Corp.* v. *FPC,* 322 F.2d 999, 1004 (D.C. Cir. *cert. denied sub nom. Texaco, Inc.* v. *FPC,* 375 U.S. 941 (1963)); *Public Service Commission of New York* v. *FPC,* 284 F.2d 200 (D.C. Cir. 1960). Moreover, the right to seek reconsideration is a valuable one, for the ICC has on many occasions shown a willingness to reverse itself. *See, e.g., Jerry Lipps, Inc.* v. *United States,* 1968 F. Carr. Cas. ¶ 81972 (E.D. Mo. 1967); *Resort Bus Lines, Inc.* v. *ICC,* 264 F. Supp. 742 (S.D.N.Y. 1967).

purposes. The court did not forbid the ICC from proceeding with the matter even though the court was fully apprised of the pendency of the petitions for reconsideration. The appellees did not seek to have the court restrain further proceedings before the ICC, nor did they attempt to accelerate hearing of the case on the merits. Indeed, the record of the agency proceedings was not even filed with the court below until late in January 1969, well after the ICC had acted on the petitions for reconsideration, had reopened the record and had again awarded temporary authority to AFL.[35]

It is amply evident that appellees had no objection to the ICC's continued consideration of the petitions for reconsideration at the time they sought preliminary relief from the court below. Their contention that the ICC lost jurisdiction once the complaint was filed was made only in connection with the Commission's reopening of the record. It appears, therefore, that appellees' real position is that while the ICC retained jurisdiction to consider appellees' petitions for reconsideration, it lacked jurisdiction to act upon those pe-

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[35] Many regulatory statutes recognize the principle that an agency may modify or reconsider its decision until the record of the agency proceeding is filed in the reviewing court. *E.g.*, *Natural Gas Act*, § 19, 15 U.S.C. § 717r; *National Labor Relations Act*, § 10(d), 29 U.S.C. § 160(d). See, *In re NLRB*, 304 U.S. 486 (1938). Referring to such statutes, one court has suggested that the ICC may reconsider its decisions even *after* the record has been filed in a reviewing court:

> There appears to be no such cut-off date[in the Interstate Commerce Act], after which the Commission could not rescind or modify its orders, as is found in the National Labor Relations Act, 29 U.S.C. § 160(e) which prevents such action by the agency after the filing of the administrative transcript with the reviewing court . . . .

Alamo Express, Inc. v. *United States*, 239 F. Supp. 694, 697-98 (W.D. Tex., *aff'd per curiam*, 382 U.S. 19 (1965)).

titions by reopening the record. Such a position is clearly untenable. If the ICC had jurisdiction to reconsider its order, that jurisdiction was meaningless unless the Commission could also take whatever steps were necessary for complete reconsideration.[36]

CONCLUSION

Two important agencies of the United States Government—the Department of Defense and the Interstate Commerce Commission—have concluded, after careful deliberation, that an immediate and urgent need exists for the direct high-speed motor transportation service for which American Farm Lines has sought temporary operating authority. These agencies have also concluded, on the basis of several years of actual experience during which AFL's service was compared with that of other carriers, that service comparable to that provided by AFL is simply not available from other carriers. The Department's conclusions represent not only a judgment based upon its vast experience as a shipper, but also an exercise of its statutory obligation to assist in reducing the costs of Government. The ICC's decision to grant authority to AFL represents the expert judgment of an agency charged with primary responsibility for implementing national transportation policy.

During the time AFL served the Government under its exemption as an agricultural cooperative it demon-

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[36] In the present case the Commission's order reopening the proceeding expressly noted that new evidence and new arguments had been advanced in the replies to the petitions for reconsideration. Accordingly, in order to provide a complete record for reconsideration the Commission ordered the record reopened for submission of sworn evidence.

strated that it is a vigorous and healthy competitor. Its willingness to compete with existing carriers in terms of rates—a phenomenon that is rare within the motor transportation industry—is evidenced by fact that in the short time it has been serving the Government it has provided well over $1,000,000 in direct transportation cost savings. AFL's entry into this field precipitated massive opposition from the regulated carriers. Literally dozens of carriers, joined by their national trade association, the American Trucking Associations, Inc., have protested AFL's efforts to obtain operating authority from the ICC. These carriers have initiated lawsuits against AFL and have supported restrictive legislation, all in an effort to eliminate competition.

The present case represents perhaps the most successful result that has been achieved so far by AFL's competitors. On the basis of highly-technical procedural arguments, they have induced the district court to nullify the Interstate Commerce Commission's decision that AFL should be permitted to compete with the existing carriers as a certificated common carrier itself. The result the carriers have thus achieved is even more extraordinary when it is understood that the authority granted to American is merely temporary authority. If, upon the completion of the more formal adjudicatory proceeding involving AFL's application for permanent authority, it is decided that AFL should not be so certificated on a permanent basis, AFL's license as a competitor will terminate and appellees will be free from this obviously nettling competitive force.

For the foregoing reasons AFL respectfully urges the Court to reverse the judgment of the District

Court and to direct the entry of judgment for appellants.

Respectfully submitted,

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APPENDIX A

I. 49 C.F.R. § 1131.2

§ 1131.2 Filing of applications.

(a) *General.* All temporary authority applications are filed at and initially processed by the Commission's field offices. The field staff of the Commission's Bureau of Operations conducts preliminary investigations into applications for temporary authority and transmits the applications, with recommendations as to their disposition, to the Commission's Temporary Authorities Board in Washington, D. C. The Bureau's field offices maintain records of authorized carriers and their operating authorities, and its staff members are available for consultation and to give assistance in the obtaining of motor carrier service, and guidance in the preparation of temporary authority applications and related supporting material, and in making rate, insurance, and other required filings. The field offices will furnish copies of necessary forms upon request.

(b) *How and where filed.* A separate application for each temporary authority sought must be filed on Form BOR-95 (§ 1003.1 of this chapter). The signed original and six copies of each application and all supporting documents must be filed with the Bureau of Operation's field office which has jurisdiction over the point at which applicant is domiciled, or such other field office as the Commission may designate in special circumstances.

(c) *Supporting statements.* Each application for temporary authority must be accompanied by a supporting statement(s) designed to establish an immediate and urgent need for service which cannot be met by existing carriers, except that when the Department of Defense is the shipper such support may be furnished directly to the Temporary Authorities Board by the Washington office of that Department. Each such shipper's statement, except those submitted by the Department of Defense must contain a

certification of its accuracy and must be signed by the person (or an authorized representative thereof) having such immediate and urgent need for motor carrier service. Any such supporting statement must contain at least the following information:

(1) Description of the specific commodity or commodities to be transported (where the transportation of property is involved).

(2) Points or areas to, from, or between which such commodities or passengers are to be transported. (If service is needed to or from a territory or area rather than a specific point or points, clearly describe such territory or area and furnish evidence of a broad need to justify the territorial grant of authority requested.)

(3) Volume of traffic involved, frequency of movement, and how transported now and in the past.

(4) How soon the service must be provided and the reasons for such time limit.

(5) How long the need for such service likely will continue, and whether the persons supporting the temporary application will support a permanent service application.

(6) Recital of the consequences if service is not made available.

(7) The circumstances which created an immediate and urgent need for the requested service.

(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.

(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal.

(10) Name and address of motor carrier who will provide service and is filing application for temporary authority.

(11) If the person supporting the application has supported any prior application for permanent or temporary

authority covering all or any part of the desired service, give the carrier's name, address, and motor carrier docket number, if known, and state whether such application was granted or denied and the date of such action, if known.

II. 49 C.F.R. § 1131.3

§ 1131.3 Processing of applications.

(a) *Notice to interested persons*—(1) *Service.* Notice of the filing of temporary authority applications tendered shall be given by the publication of a summary of the authority sought in the FEDERAL REGISTER, except that no such summary will be published in the case of emergency temporary authority applications. Such summaries will be prepared by the appropriate Bureau of Operations supervisor and forwarded to the Office of Proceedings, Washington, D. C.

(2) *Filing of protests.* Any interested persons who can and will provide all or any part of the proposed service may file a protest against the application. Such protest must be specific as to the service which such protestant can and will offer and must consist of a signed original and six (6) copies which must be filed with the district supervisor named in the FEDERAL REGISTER publication within 15 calendar days after the date notice of the filing of the application is published in the FEDERAL REGISTER. One copy of such protest must be served on the applicant or its authorized representative, if any, by U.S. mail or in person.

(b) *Publication of rates and charges.* A carrier may not lawfully perform transportation under a grant of temporary authority unless and until compliance has been made with the rate and other requirements of section 217 of the Interstate Commerce Act in the case of common carriers and of section 218 of the act in the case of contract carriers, as provided in § 1131.5.

(c) *Revocation for noncompliance, and reinstatement and extension of time for making compliance.* (1) Temporary

authority is approved subject to compliance within 30 days, or within such additional time as the Commission may approve, with the applicable provisions of the statute and the requirements, rules, and regulations prescribed by the Commission thereunder governing the filing of rate and contract publications, the filing of acceptable evidence of security for the protection of the public and designation of agents for service of process.

(2) If compliance is not made within the 30-day period, or within the time allowed in any extension thereof applicant will be notified that the temporary authority order is of no further force and effect. Where this occurs, applicant may make written request for reinstatement of the granting order if it so desires, provided (i) that such request is made within 20 days from the date of the notice, (ii) that good cause can be shown as to why compliance was not made within the time allowed, and (iii) that the request for reinstatement contains positive assurance that applicant is now able to and will comply immediately with all applicable requirements, if the order is reinstated.

III. 49 C.F.R. § 1100.101(g)

(g) *Petitions for reconsideration of appellate division decisions on review of board decisions.* When an appellate division has denied a petition seeking a reversal, change, or modification of a determination whether original or on review by a board of employees, any further petition for reconsideration by the same party or parties upon substantially the same grounds will not be entertained. If in the consideration of such a petition, however, by the appellate division, the previous determination of the board of employees has been reversed, changed, or modified, a further petition may be filed by any party to the proceeding adversely affected by the decision of the appellate division, within the time specified in paragraph (e) of this section, and the petition will be considered and disposed of by the same appellate division which passed upon the initial petition.